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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, *et al.*,
Appellants,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

FRANK V. PONTERIO,
Appellant,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR MUNICIPAL APPELLANTS AND APPELLANT STRANIERE

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ARGUMENT

THE COMPOSITION AND VOTING SYSTEM OF THE BOARD OF ESTIMATE COMPORT WITH THE CONSTITUTION.

A. Appellees' Mechanistic Analysis Misconceives The Principles Embodied In This Court's One Person, One Vote Jurisprudence. The Voting Structure of the Board of Estimate Should Be Upheld Because It Accords Substantial Equality Of Voting Power To The City's Voters And Respects The Principle Of Majority Rule.

Appellees' analysis of their equal protection claim goes like this: First you find a convenient mold into which you squeeze the Board of Estimate. Anything that doesn't fit (like the three city-wide officials) you ignore. Then you judge deviations from "perfection" by measures appropriate to the mold (but not appropriate to the institution being judged). The magic number is 17% (Appellees' Br. at 22). Anything less may be justified; anything more must be rejected. As for the need for flexibility, only small local governments get its benefits. Large local units, like New York City, do not.

This mechanistic analysis misconceives the important principles embodied in the Court's one person, one vote jurisprudence. That jurisprudence is not a series of arithmetical puzzles or tests. It embodies principles of political equality which attempt to insure that citizens enjoy substantially equal opportunity to exercise electoral power. On the local level, the Court has recognized the need for flexibility—not, as appellees appear to suggest (Appellees' Br. at 38-40), because local governing units are small, but because they are so numerous, so diverse in powers and structure, so close to the people they govern, and so individually tailored to the needs of the locality. Forcing all these local units into a few approved molds would seriously limit local options and destroy the diversity which itself is so important to democratic governance in a country as large and complex as ours.

The Board of Estimate illustrates why the one person, one vote principle should be applied flexibly in judging local governments. The Board is an institution that has evolved in response to

the particular needs of New York City. For its eighty-eight year history, it has expressed the shifting compromises between regional and local needs that has made possible the governance of the City. And, most importantly, it has done so respecting the principle of majority rule and substantial equality of voting power.

The three city-wide officials on the Board cast six of the eleven votes. Thus, as we noted in our main brief, with respect to almost all of the Board's business, no combination of borough presidents can overcome the collective will of the city-wide officials. When the city-wide officials split their votes (2 to 1), the lone city-wide official cannot prevail without the concurrence of at least four borough presidents representing at least 70% of the City's population. The presidents of the three less populous boroughs (Manhattan, the Bronx and Staten Island) cannot prevail as against the presidents of the two larger boroughs (Brooklyn and Queens) without the concurrence of at least two of the three officials elected by all City voters.

Appellees have not responded to this analysis of the Board's voting structure but attempt instead to deflect attention from it by focusing almost entirely on but one of the Board's functions—with respect to the budget—when its voting structure is different. When the Board acts on the budget, the Mayor does not cast a vote as a member of the Board. N.Y.C. Charter §§120(d); 222(c) (hereinafter "Ch.") (Thus there are five borough president votes and four city-wide votes.) But even here, a majority can be obtained only with the concurrence of one or more officials elected by all the voters of the city, or by action of all the borough presidents voting *unanimously*. Further, the Board's role in the budgetary process is itself quite limited. The process is dominated by officials who are elected by all the people of the city—the Mayor (who plays the leading role in the process), and the two other city-wide officials on the Board of Estimate (the Comptroller and the President of the City Council)—and by the City Council, which not only must concur with the Board on the budget, but must also raise the revenues to finance the budget. Ch. §§116; 120(b); 124; 219(a); 222(a); 1516.

Under the City Charter, the Mayor proposes the budget. Ch. §§116; 219. Once that proposed budget is submitted, it is ex-

tremely difficult to make changes without, or indeed even with, the Mayor's consent. Even if the Mayor agrees with a change, it still takes a majority of the City Council and five of nine votes on the Board to make the change effective. Ch. §§120(a); 222. Thus, to effect a change even with the Mayor's agreement, it takes the concurrence of either (1) all five borough presidents and a majority of the City Council, or (2) three of the five borough presidents and an official elected by the voters of all the boroughs and a majority of the City Council or (3) one borough president and two officials elected by the voters of all the boroughs and majority of the City Council. Without the Mayor's concurrence, a change is not effective in his proposed budget unless a super-majority (2/3) of either the Board or the Council and a majority of the other body votes in favor of the change. Ch. §§121(b); 223(a)

It is not surprising, then, that the budgets ultimately adopted have been substantially the same as those proposed by the Mayor. For example, in the budget for the fiscal year 1989, changes from the proposed expense budget to the adopted budget amounted to approximately .2% of the budget. In fiscal 1988, the changes amounted to .42%. In fiscal 1987, the changes amounted to .15%.[1]

There are other major ways in which power to shape the budget is wielded, which do not involve the Board of Estimate at all: the power to estimate revenues and the power to raise revenues by taxation. Under the City Charter and state law, the City must have a balanced budget. Financial Emergency Act for the City of New York §§8(1)(a), N.Y. Unconsol. Laws §5410(1)(a) (McKinney 1979); Ch. §1516. Thus, the power to increase, or refuse to increase, taxes is the power to influence the shape of the budget. In New York City, it is the local legislative body — the City Council — which has sole authority to levy taxes, whether taxes are raised pursuant to state enabling legislation (*e.g.*, income tax, sales tax [N.Y. Gen. City Law §25-m *et seq.* (McKinney

[1] *Compare* The Executive Budget of the City of New York for the Fiscal Year 1989 at 4E [hereinafter "Executive Budget"] *with* Adopted Budget for Fiscal Year 1989; *compare* Executive Budget of the Fiscal Year 1988 at 4E *with* Adopted Budget for Fiscal Year 1988; *compare* Executive Budget for the Fiscal Year 1987 at 4E *with* Adopted Budget for Fiscal Year 1987.

1968); N.Y. Tax Law §1210, *et seq.*; §1300 *et seq.* (McKinney 1987)]), or as provided by the City Charter (real property taxes [Ch. §1516(a)]). Ch. §§21; 27. As part of the budget process, the Mayor estimates all sources of city revenue other than real property taxes. Any difference between this estimate and the amount of the budget must be made up by taxes on real estate. Thus, substantial increases in the budget would require a decision to raise real estate taxes for city residents and businesses. This decision is made solely by the City Council and does not involve the Board of Estimate.[2]

Thus, the voting structure of the Board of Estimate is not so simple as appellees would have it. It is a structure which accommodates the complex needs of the City but at the same time ensures that decisions can not be made without the concurrence of officials who represent a majority of the City's voters.

B. As A Method Of Analysis, The Banzhaf Index Is Superior To The One Urged By The Appellees And Adopted By The Courts Below Which Ignored The Structure Being Analyzed. In Any Event, The Constitutionality Of The Board Should Not Depend On The Correctness Of Any Particular Method Of Analysis But Rather Should Depend Upon The Structure Of The Board Itself And The Important Policies It Was Designed To Further.

Appellees attack the Banzhaf Index as if we were proposing it as a test, the passage of which would determine the constitutionality of the Board. We do not believe the Index is any such thing. We propose it simply as a way of describing a voting structure more complex than that of the typical single member legisla-

[2] The Board of Estimate has the power to approve franchise fees and fees for waste disposal by private carters (together amounting to .6% of the City's total revenues). Appellees' claim that the Board has a "significant impact" on the City's tax rate "through its cumulative powers to control revenue from land use and franchises" (Appellees' Br. at 7) is palpably incorrect. Any attempt to affect the tax rates in a City with a budget in the billions through franchise fees and the like is akin to lowering the City's harbor with a water bucket. Appellees also misstate that the Board of Estimate controls the water and sewer rates. That responsibility is with the New York City Water Board. N.Y. Pub. Auth. Law §§1045-g(4); 1045-j; 1046 (McKinney Supp. 1988).

tive district. Methods of analysis appropriate to these less complex structures (like simply comparing the populations of the districts) are not meaningful when applied to a structure, like the Board, which combines district representation and at-large representation and also weighs the votes of the at-large representatives more heavily than (two times) those of the district representatives. If a method of analysis is not appropriate to a particular voting structure, the answer is to use a different method of analysis — not to find reasons for ignoring the voting structure and judging the body as if it were something other than what it is.[3]

Because the real Board of Estimate does not easily fit the simplistic analysis favored by appellees, they (and the courts below) have been forced to search for reasons to ignore the existence of the six city-wide votes on the Board. They have settled on a theory — that the city-wide officials and the borough presidents represent different "interests" (Appellees' Br. at 27-29) — which is entirely inconsistent with the claim appellees have put forth in this case. That claim is not based on allegedly unequal representation of "interests." The claim is that the voting structure of the Board creates an unconstitutional diminution of the electoral power of individual voters in Brooklyn and Queens. But the fact is that each of those individual voters has the opportunity to wield his or her electoral power by voting for *four* members of the Board — not one. Put another way, each voter has the opportunity to vote for officials who cast seven votes on the Board (three city-wide officials who cast two votes each and one borough president who casts one vote). Appellees' analysis, adopted by the courts

[3] As appellees themselves recognize (Appellees' Br. at 32, n.52), appellate courts, including this one, have approved the use of methods of analysis other than a simple arithmetical comparison of population. For example, in *Franklin* v. *Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68 (1973), *appeal dismissed for want of a substantial federal question*, 415 U.S. 904 (1974), the New York Court of Appeals approved an analysis of voting power similar to the one we have urged here. In *Franklin*, that analysis was applied somewhat differently from what we have urged. But, for the reasons we fully explained in our main brief (Appellants' Br. at 35-38), we believe that with respect to a body like the Board of Estimate, our proposed application of that analysis is more appropriate.

below, simply ignores 6/7 of the voter's opportunity. No amount of argumentation can hide the unreality of the analysis advocated by appellees and upon which the decisions below rest.[4]

The Banzhaf Index is an attempt to look at the voting structure of the entire Board not just one part of it. As a method of analysis it is surely superior to one which ignores the body being analyzed. Moreover, the criticisms leveled against the Index by the appellees are beside the point. These criticisms go to the question whether the Index accurately describes the political realities and dynamics of the Board. But neither the Index nor the analysis used by appellees and the courts below is designed to measure these dynamics. The Index is designed simply to analyze the rules that make up the formal voting structure of the Board. That, after all, is what is addressed by the one person, one vote principle. Under the rules which govern voting, does each citizen have a constitutionally appropriate opportunity to affect the governing body through his or her vote? If the answer is yes, as we believe it is here, questions of how power is exercised by members of the body from issue to issue in the hurly-burly of political life is beyond the scope of inquiry.

The Banzhaf Index is nothing more than a lens through which to view the formal voting structure of the Board. For reasons explained in our main brief, we believe it is an appropriate lens. However, ultimately the continued existence of the Board should depend not on the appropriateness of the lens but upon the structure of the Board itself and upon the important state policies reflected in that structure. The salient characteristic of that structure is that decisions of the Board cannot be made with-

[4] Appellees cite in support of their position, Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 Fordham L. Rev. 735 (1985). (Appellees' Br. at 24, 35). But Ms. Charo criticized the District Court for failing to consider the votes of the city-wide officials in its calculation of the deviation and urged the application of Professor Banzhaf's voting power principles. *Id*. at 758, 775, 794 n.308. However, as noted by Professor Banzhaf in his amicus brief at page 24 n.31, Ms. Charo's calculations were done erroneously.

out the concurrence of officials who represent a majority of city voters.

C. The Structure Of The Board Of Estimate Respects The Principle Of Majority Rule and Substantial Voter Equality While It Also Embodies The Compromise Between Local Autonomy And Centralized Authority Which Has Been Vital To The Successful Governance Of The City.

Respect for majority rule has been a central part of the compromise reflected in the Board during all of its almost 90 year history. This compromise—accommodating the need for local representation and the needs of the larger consolidated city — has contributed in crucial ways to the growth and successful governance of the City. Appellees attempt to minimize the importance of this history by suggesting that this Court should not give great weight to a "deal" made almost ninety years ago (Appellees' Br. at 45). But the Board is not the relic of a ninety year old "deal." It is a response to conditions which were evident ninety years ago and which continue today.

Consolidation of the City in 1898 brought a great centralization of power and with it a great dissatisfaction about that centralization. Borough representation had not been given sufficient respect; and the borough presidents were not given substantial power. This dissatisfaction threatened to destroy the consolidation. In the next three years dramatic changes were made to redress the balance—and save the City. Most importantly the borough presidents were given votes on the Board of Estimate.

The recently issued report of the Citizens Union Foundation of the City of New York, lodged by appellees with this Court, describes the history as follows:

> Although the 1897 Charter provided for a strong mayor and a strong centralized government, it attempted to protect the local interests of the various towns and counties that became greater New York by creating the office of an elected president in each of the five new boroughs. He functioned as a borough mayor and was connected to the central city government through membership on the Board of Public Improvements. It is important to note that the borough president, with very limited powers, could vote only on those issues coming before the Board of Public Improvements that involved his borough. . . .

There was almost immediate dissatisfaction with the 1897 Charter. Brooklyn felt short-changed under consolidation, both in terms of the hoped-for public improvements and in terms of local autonomy. There were widespread feelings that the boroughs should be allowed to regulate their own distinctly local improvements[.]. . . [T]he 1901 Charter did give the borough presidents extensive authority over public works. The State Charter Revision Commission in 1900 redistributed power in the city and made the Mayor and the borough presidents "partners" in the newly designed Board of Estimate and Apportionment. The Commission, concerned with borough representation as well as with borough control over local improvements, wrote:

> It is clear that the vast territory composed within the present City of New York, embracing as it does, districts so essentially different as the crowded east side of Manhattan and the rural districts of Queens demand some subdivision and some degree of local autonomy....

"Borough Representation", Citizens Union Foundation Report to the New York City Charter Revision Commission at 14-15 (March 1988), *reprinted in* Appellees' Lodged Material [hereinafter, "Citizens Union Report"].

These issues of centralization and borough representation did not disappear in 1901. They are still with us. As the Citizens Union Report says:

> Words similar to these [describing the need for borough representation] appear over and over again in the literature. They could have been said in the 1930's, 1950's or 1970's; the issue simply has not been resolved and perhaps can never be.

Id. at 15.

Every charter revision commission since that of 1900 has faced the same questions. Every one has left the structure of the Board largely unchanged. These decisions were not the result of an unthinking obeisance toward history. After careful study,

those charged with the responsibility of making changes recognized the wisdom of, and the continuing need for, borough representation on the Board. The counsel to the 1900 Charter Revision Commission, who drafted the provision which gave the borough presidents a seat on the Board, wrote that the provision was "necessary at the time as the boroughs were faring badly under the centralized local government. . .The boroughs were sadly in need of local improvements and couldn't get them" (Quoted in Citizens Union Report at 16).

The 1938 Charter made major changes in city government. But, in the words of the Citizens Union Report, the Charter Revision Commission that recommended the adoption of that charter

> retained the borough presidents on the Board of Estimate to allay the fears of the outlying boroughs that they would lose power and autonomy.

Id. at 21.

The Commission summarized the reasons for its decision as follows:

> With respect to borough government, the Commission has adopted neither of the two extreme views which were vigorously pressed upon it, the one that the borough president should be abolished and all administration centralized and the other that the existing administrative powers of the borough presidents should be increased rather than curtailed. The Commission is satisfied that there exists in a large part of the city an overwhelming sentiment . . . for borough representation on the Board of Estimate. . . . It is the conviction of the Commission that such representation is not only important in the interest of the boroughs but in the interest of the city as a whole. Those who administer the manifold affairs of the city should be intimately familiar with the conditions and needs of the five boroughs. . . .

Quoted in Citizens Union Report at 21-22.

In 1961, a summary report of a state commission on governmental operations found New York City's borough organization to be "unique" because it brought "representatives of the boroughs into the top structures of local government." As described

by the Citizens Union Report, the 1961 report found that the borough president continued to be the spokesman for his borough. The 1961 report

> spoke of "this big city with its borough traditions, borough representation and leadership functions and citizen contacts" (p. 9). It "recognizes that the five boroughs in New York City have a time-honored place in the tradition of the community. The role of borough presidents as community leaders within their boroughs is a matter of civic necessity"....

Id. at 23.

More recently, when certain powers of the borough government were being redistributed — some to the City and some to units smaller than the borough — there remained a continuing recognition that borough representation, through the borough president's vote on the Board of Estimate, was very important. The Citizens Union Report describes the 1975 Charter Revision as follows:

> The borough presidents were to serve as the glue to keep these separate communities from flying apart. They were seen by the [Charter Revision] Commission as the "most knowledgeable public officials with respect to the competing influences and forces in the affected community." They were seen as "broker advocates," giving private citizens direct access to decision makers at the highest level through their position on the Board of Estimate. Their positions were maintained and further institutionalized within the new Community Board structure.

Id. at 24-25.

Thus the forces which created the Board's structure in 1901 are the same as those which make the Board so important now. "[F]or millions of New Yorkers" concluded the 1988 Citizens Union Report at p. 3, the issue of borough representation "involves their sense of themselves, of their neighborhoods and of their city."

D. The Voting Structure Of The Board Does Not Give Disproportionate Power To Any One Borough President. The Structure Appropriately Accounts for Local And City-Wide Interests.

In the District Court, appellees conceded that the Board of Estimate "is needed" and "works" (JA 547).[5] The District Court found that the Board had in fact furthered the important interests for which it was designed: facilitating the City's ability to exercise central authority while at the same time giving a meaningful voice to local interests; preserving historical, geographic, and political boundaries; maintaining a small, collegial and effective body of the City's highest elected officials; providing a check on mayoral powers (A 82-97). According to the District Court, the structure of the Board "has proven conducive to accomplishing the Board's mission" (A88).[6]

Appellees now wish to retreat from their earlier concessions and from the findings of the District Court. They wish to demean the effectiveness of the Board as a unifying force in the City. They attempt to do so by making an extraordinary allegation which they have never before attempted to prove. According to appellees' brief before this Court, the voting structure of the Board has "substantially advantaged the small boroughs" particularly by in-

[5] References to the Appendix to the Jurisdictional Statement will be preceded by the letter "A". Numbers preceded by the letters "JA" refer to the pages of the Joint Appendix.

[6] Appellees claim that the justifications proffered for the Board are just a "rehash" of those rejected by this court in *Andrews* v. *Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir.), *aff'd mem. sub nom.*, *Giacobbe* v. *Andrews*, 459 U.S. 801 (1982). The main justification offered in *Andrews* was the desire to provide minority party representation on the City's legislative body—the City Council. That justification has nothing to do with the important interests furthered by the voting structure of the Board of Estimate. A secondary interest was the desire to give voice to borough-wide interests on the City Council. However, when the District Court rejected that justification, it specifically noted that one of the reasons for its rejection was the fact that the Board of Estimate provided a channel for the borough-wide perspective through the votes of the borough presidents. 528 F. Supp. at 251.

suring that Staten Island receives a disproportionate share of the City's resources (Appellees' Br. at 10).

Attempting to prove such an allegation would be difficult even in the appropriate forum — the District Court. It would require complete analysis of the City's very complex budgets over time and an examination of myriad other actions. Appellees' selective citation in an appellate brief of a few isolated budgetary items is not an "analysis" in any meaningful sense.

First, appellees compare the "administrative office budget" of the various boroughs (Appellees' Brief at 11-12). They do not mention that each borough president chooses to include different expenses within this rubric so that comparing "administrative office" budgets without a further analysis of functions tells nothing about actual allocation of resources.[7] Second, appellees cite a newspaper report to support an allegation of an "inverse relationship" in the "funding of public service programs" (Appellees' Brief at 12). What they appear to be referring to are relatively minor additions to the $16.7 billion expense budget for fiscal year 1984. Once again they do not say what is included in the category of "public service" programs in each of the boroughs so that comparisons are meaningless. Finally, they cite "similar disproportions" in capital spending (Appellees' Br. at 13). Here they compare capital budget expenditures in Staten Island in fiscal 1984 to capital expenditures in community districts they have selected in Brooklyn and Queens.

Not only are the expense budget figures selected by the appellees meaningless in themselves, but in sum they represent a minute portion of the City's 1989 $25-billion expense budget, a budget that makes provision for, among many other things, police, fire, sanitation and education services to the residents of the

[7] For example, in fiscal year 1989, the Bronx Borough President's budget contains an allocation of $700,000 for economic development purposes that in Brooklyn are principally funded through the Mayor's Office of Economic Development. Similarly, the Queens and Staten Island Borough Presidents are required to have large allocations for their Topography Units, which are not required to be as large in the other boroughs. This difference is not a reflection of varying political power, but rather reflects the greater need to map streets in those boroughs because they have more undeveloped land.

City. The provision of these services depends upon the need for them, not on the borough in which they will be provided. For example, the Police Department, with an annual budget exceeding $1 billion, deploys a greater number of police officers in Manhattan and Brooklyn, both in absolute numbers and in proportion to population, than it does in Staten Island or Queens.[8] Does this mean that the borough presidents of Manhattan and Brooklyn are wielding a disproportionate share of political power? Or does it mean that there is more need for police in these boroughs? Likewise, firefighters are deployed where they are needed, and other services are similarly allocated.

Similarly, when considering the capital budget, one cannot simply compare expenditures in different geographical areas and conclude that political power is proportionate to the size of the expenditure. First, expenditures vary from year to year. A large expenditure in one year may reflect a lack of expenditure in prior years. For example, if in one year there is a large capital outlay for water mains in Staten Island, does that reflect a disproportionate political power? Or does it reflect the fact that water mains have already been constructed in the other boroughs but not in Staten Island?

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[8] The 13,346 police officers deployed in precincts in Fiscal Year 1989 are distributed by borough as follows:

	S.I.	Queens	Brooklyn	Manhattan	Bronx
Officers Deployed	499	2563	4058	3998	2228
Percentage of Total	3.8%	19.3%	30.5%	30.0%	16.7%
Borough Percentage of City Population	5.0%	26.8%	31.6%	20.2%	16.6%

Police deployment in the three community districts in Staten Island and the three community districts in Brooklyn and Queens that appellees select for comparison in capital spending is as follows:

	S.I. Community Districts	Brooklyn Community Districts	Queens Community Districts
	1, 2, 3	3, 4, 16	8, 11, 13
Officers Deployed	499	844	475

Appellees also make the entirely unfounded assumption that all capital expenditures reflect desired benefits for the communities in which the expenditures are made. This assumption is false. Millions of dollars are being spent on the Fresh Kills landfill in Staten Island. This garbage disposal facility has been reviled by many of Staten Island's residents.[9] Does this capital expenditure reflect a disproportionate political power of the borough president on the Board of Estimate? Or does it reflect the fact that, contrary to the expressed interests of many citizens of Staten Island, its land is being used to benefit the entire city? Indeed projects like this make it imperative that the borough president of Staten Island have a meaningful voice on the Board. Without such a voice residents of that borough would find it even more difficult to accept such onerous capital expenditures for the good of the whole.

Appellees, after favoring the Court with this budget "analysis", then attempt to demonstrate that the "disproportionate power of Staten Island" also reduces its share of what appellees apparently consider to be undesirable projects. They assert that if votes "had been weighed proportionately to population", the "losers" of certain votes on the Board would have prevailed (Appellees' Br. at 14). One case cited is the construction of a resource recovery plant in Brooklyn. Appellees do not reveal that this was the first in a comprehensive program that would place such plants

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[9] A recent Article in the New York Times, September 10, 1988, p. 29, col. 1, describes the Fresh Kills facility as follows:

> Almost all that trash now comes to Fresh Kills—once a lush swamp that blue crabs called home, and now Earth's biggest dump. Sanitation officials project that by the turn of the century, Fresh Kills—already steep enough to schuss—will have grown to become the highest point on the Eastern Seaboard.
>
> It is grim almost beyond description. The stench recalls the festering, viscous bottom of a filthy garbage can. Hills where the stones and gravel have been spread over generations of refuse are eerily, lifelessly bare. Over newly arrived garbage, tens of thousands of gulls swarm crazily about, shrieking delight over their revolting fare. Here—at Fresh Kills—is where things, all things, end up.

in every borough. *See, e.g.*, Resolution of the Board of Estimate, dated December 20, 1984, Cal. No. 19. Nor do they mention that the decision was supported by a city-wide representative and four of the five borough presidents. In the two other instances cited, the construction of homeless shelters and subsidized middle-income condominiums, at least two city-wide representatives and two borough presidents voted in favor of the condominiums and all of the shelters.[4] Appellees also neglect to state that although no shelter was at that time voted for Staten Island, a new jail was slated for that borough. *See* Adopted Budget for Fiscal Year 1989 at 10C--Project No. C-143. Surely, having to sustain a jail (as opposed to a homeless shelter) does not demonstrate a disproportionate political power by the borough president of Staten Island.

E. The Courts Below Effectively Gave No Weight To The Decisions Of The State Concerning Which Structure Of Government Best Serves Important State Interests.

As noted above and in our main brief, the District Court found that the structure of the Board furthered very important state interests. After so finding, however, the Court effectively gave no weight to the interests. The Court applied a "least restrictive alternative" test under which the Board of Estimate could not be sustained if any other hypothetical structure of government with a lesser deviation could be said to further the same interests. In this calculus, a hypothetical argument about how a non-existent structure might possibly further state interests is given weight greater than the ninety years of experience which showed that the Board's structure did in fact further these interests. This method of analysis inevitably leads to the imposition of hypothetical structures upon real situations and crowds out the diversity and flexibility in local governmental units which is favored by this Court's one person, one vote jurisprudence.

Appellees do not attempt to justify this approach. Instead they say that we have mischaracterized what the District Court did. According to appellees, the courts below did not use a "least

[4] *See*, Resolutions of the Board of Estimate, dated August 19, 1987, Cal. Nos. 4, 6, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 27, 31, 33, 36; Minutes of the Board of Estimate Hearing of August 19, 1987.

restrictive alternative" test (Appellees' Br. at 45). We think it best to let the District Court speak for itself (A97-98):

> Validating the foregoing policies and interests [furthered by the Board's structure] lightens but does not relieve defendants of their burden of justification. They must also demonstrate that no alternative plan would satisfactorily embrace the legitimate considerations and diminish the deviation. If another alternative would do so, then the present plan "may [not] reasonably be said to advance" the accepted goals. *Mahan* v. *Howell*, 410 U.S. at 328.

Id. 97-98. The Court of Appeals adopted this holding without comment (A39).

No decision of this Court authorizes such a rule. It is both bad law and bad policy because it removes from the states and localities the ability to choose from among various options the form of government best suited to the needs of the locality. The rule applied below transforms the equal protection clause into a "uniform straitjacket [to] bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery* v. *Midland County*, 390 U.S. 474, 485 (1968).

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE CASE REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT DECLARING THAT SECTIONS 61 AND 62 OF THE NEW YORK CITY CHARTER ARE VALID.

New York, New York,

September 27, 1988

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